

Business

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Million Dollar Mistakes

Working Backward to Minimize the Risks of Cremation Liability



When it comes to cremation, mistakes can be expensive – really expensive. The average verdict in a wrongful cremation lawsuit is upward of \$1 million.

Mistakes can also be bad for business (for obvious reasons), and in some cases grounds for suspension or revocation of professional licensure. Nevertheless, the reality is that to err is human – and so, those seven figure verdicts will keep coming as long as hearse-chasing attorneys keep chasing them.

So the next time you see a headline about a \$1 million verdict in a wrongful cremation lawsuit, rather than passing judgment or thinking “that could never happen to me,” take the time to find out what actually happened and use the

invaluable opportunity to learn a free lesson from someone else’s million dollar mistake.

Instead of approaching the concept of cremation liability in the abstract, imagine that the headline was about you. Start at the \$1 million verdict and work backward, recognizing the risks and vulnerabilities in your own daily operations, identifying at each step along the way what could – and should – have been done differently to avoid the devastating outcome to begin with. The key is to always err on the side of caution by ensuring that policies and procedures are in place from start to finish – intake to delivery or interment of cremated remains – and to anticipate and mitigate the situation if and when a mistake does occur.

By far, the most common mistake alleged in cremation lawsuits is wrongful cremation due to misidentification. While it may seem ridiculous to the average funeral practitioner reading this, it happens more often than you’d think – and it can easily happen to the most experienced, well-trained funeral professionals.

Now imagine one day it happens to you. The jury awards \$1 million to the Smith family after it is discovered that the remains of John Smith were cremated when he was supposed to be embalmed for an open casket viewing. How on earth did you end up here? Why could this possibly have happened to a respected establishment such as yours?

Well, the best way to find out is by starting at the end and working backward, asking:

- How did the family learn about the error?
- When, and by whom, were they informed that John Smith had been cremated?
- Who checked the identity of John Smith's remains last before his remains went in the retort?
- What are the vulnerabilities of your identification system?
- What internal documentation was checked and/or signed – and by whom – from the last identification before cremation through the initial intake of John Smith's remains?
- Are your records kept electronically, on paper, or both?
- If a computer program or database is used, who entered the funeral goods and services selected by John Smith's family into your system for processing?
- Did the family, for some reason, sign a cremation authorization at some point during the process without understanding what it was?
- Who prepared the statement of funeral goods and services selected?
- Who met with the family to review your General Price List and discuss options for disposition, including but not limited to the possibility of cremation?
- And so forth.

The point being to imagine yourself in this possible scenario as a preventative exercise to identify each and every potential mistake that could have resulted in this outcome as you walk through the procedures in place at your own establishment, becoming hyper-aware of any and all room for error at each step along the way. Now start over again with the added condition that there were two John Smiths being cared for by your establishment at the time of this John Smith's cremation. Does this increase the potential for error, and if so, why is that?

The second most common mistake giving rise to cremation liability is ineffective cremation

authorizations, specifically a lack of permission from next of kin. Now imagine the \$1 million verdict was for failure to obtain permission from next of kin when five of unmarried John Smith's six adult children come forward claiming that they were not OK with his cremation, despite the fact that their brother is the one who unilaterally made the arrangements and signed the cremation authorization form without disclosing the fact that he had five siblings on the same level of the next of kin hierarchy, thus rendering the authorization ineffective.

How did this happen?

Did you inquire about the possibility of other siblings at the time arrangements were made? Did you explain that adult children fall on the same level of next of kin such that consent from a majority of the siblings is typically required to authorize cremation, with narrow exceptions under exigent circumstances? Does your cremation authorization form – or any of your other intake paperwork – include a section for listing the names and contact information of family members such as spouse, parents and adult children?

The identification of an authorizing agent and confirmation of his or her legal authority to authorize cremation is tantamount to protection from cremation liability. Because the determination of next of kin is codified in state law, the best practice is to quote the statutory provision verbatim in a cremation authorization form and require the individual(s) making funeral arrangements to clearly and affirmatively represent that he/she/they have the legal authority to do so, in acknowledgement of the applicable statutory hierarchy of next of kin, initialing upon review of the same, and attesting that they have the corresponding right to control disposition for making the arrangements in lieu of another individual or individuals in any given class under the statute. Adding multiple stopping points for

initialing and/or signed affirmations as to the accuracy of the representations being made along the way as you review the cremation authorization form is preferred – better safe than sorry.

State law varies as to the requirements for cremation authorization forms, including – but not limited to – specific language and disclosures to be included therein. However, it is important to bear in mind that state law is the absolute minimum requirement, and thus should be treated as such. There is nothing preventing a funeral service establishment from going above and beyond the bare minimum, and indeed the best practice is to do so. Organizations such as the Cremation Association of North America, International Cemetery, Cremation and Funeral Association and the National Funeral Directors Association provide valuable resources to members, including model cremation authorization forms that are typically more detailed than minimum state requirements. When using such model forms, it is imperative to ensure that applicable state requirements are also met, and revisions must be made accordingly, while adapting the rest as above and beyond the minimum. This is another example of erring on the side of caution.

And yet mistakes will still happen. Because no matter how many good-intentioned steps are taken to ensure the accuracy of a cremation authorization form, or the number of signatures obtained from the individual(s) claiming to be an authorized representative, sometimes folks may not be willing or able to provide the necessary information to make an accurate determination as to the statutory next of kin with right to control disposition. And when that happens, the best way to document due diligence on the funeral professional's end is going to be a signed, detailed cremation authorization form that was thoroughly reviewed with the individual(s) making

funeral arrangements as evidence of a reasonable basis for the funeral establishment's good faith understanding that the representations made therein were truthful and accurate such that cremation was authorized at the time of signing.

Next to misidentification, mishandling cremated remains can have the most devastating emotional impact on family members. Handling cremated remains is no different than handling remains in any other form, and the seriousness of this must be reflected in the acts of everyone involved along the way. Not only is cremation irreversible, but cremated remains cannot be replaced if lost. Nor can they be distinguished once comingled. This also includes the processing, storage and delivery of cremated remains.

To prevent errors at these stages, funeral establishments must store cremated remains in a safe, secure location and maintain thorough records to document chain of custody until the moment the remains are picked up by the recipient designated in the cremation authorization form, with a signature obtained upon receipt, or dropped off with a courier for delivery in accordance with written instructions signed by the authorizing agent. While state law regulating the disinterment of cremated remains is typically more lax than that of interred human remains, which typically require permits and, in some cases, a court order, funeral service providers must obtain permission from cemetery authorities, as well as next of kin, before assisting with the disinterment of cremated remains. Although disinterment is generally disfavored and fairly uncommon, the potential for exposure to liability from another interested party in the rare cases that it is requested is significant and the chances of litigation ensuing high, so adequate measures must be taken in appreciation thereof.

So here we are with yet another \$1 million verdict. This time because John Smith's cremated remains were lost.

Working backward, how did you get here? What could have been done differently along the way to prevent this outcome?

Do you have adequate safeguards in place to prevent this from happening? Same questions, but this time the cremated remains were comingled with those of another deceased. What if they were released to the wrong family member? Or were shipped to the wrong address? Working backward, where were the vulnerabilities for these errors, and what measures could have been taken to minimize the risks leading to these outcomes?

Cremation is the ultimate act of permanence, the seriousness of which must be appreciated at all times by everyone involved at each step along the way. And, even so, mistakes will inevitably be made. But taking a proactive approach to risk-management, beginning with exercises like this, are the best means to ensure that preventative measures are in place to minimize your risk for cremation liability if and when an error does occur. Those who choose to work with third-party crematories must go even further and take additional steps to protect themselves from liability for the potential mistakes of any number of other individuals over whom they have no control.

While this is a topic for another discussion in and of itself, it is worth mentioning in this context to raise awareness that more proactive steps must be taken in those circumstances to add additional protections from liability, both in terms of insurance and indemnity provisions in contracts, as well as due diligence to maintain transparency in operations, compensating for all of the steps along the way at the third-party facility that are out of the funeral establishment's control, when working backward through this

exercise.

Should a lawsuit be filed, from a legal perspective, the best defense to a mortuary litigation claim truly is a good offense in the sense that the more well-documented the process on the funeral service establishment's end, the less vulnerable it will be to allegations of wrongdoing. Again, starting at the end and working backward, carefully consider all of the different forms of documentation that you would ideally want to have as evidence to defend yourself against allegations of negligence in a wrongful cremation lawsuit. Then make sure that you have all of that documentation completed for every single case that comes through your establishment – without exception – and that you organize and maintain that material for a sufficient period of time, whether with hard copies or digitally, so as to make them readily accessible should the need arise. Your lawyer will thank you for it, and it will make both of your lives much easier. Trust me: There is no such thing as being too thorough when it comes to documentation.

Above all, the number one priority, of course, must be to guarantee the highest quality of service to the families to whom you, as funeral professionals, have dedicated your lives to serving. And that goal is not at odds with the interests of funeral service providers – rather, they go hand in hand. Implementing safeguarding policies and procedures to mandate diligent, detailed recordkeeping with practical mechanisms in place to minimize the potential for error every step along the way makes perfect sense. You also want to have policies in place to mitigate the situation as soon as possible if and when mistakes do occur, to meet and exceed the standard of care while protecting your own establishment from liability.

So take the time to work backward through the headlines. Do not let the next million dollar mistake be your own. •